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BY HAND AND ELECTRONIC MAIL

Mary L. Cottrell, Secretary
Department of Telecommunications & Energy
Commonwealth of Massachusetts
One South Station, 2nd Floor
Boston, Massachusetts 02110

Re: Fiber Technologies Networks, L.L.C. v. Town of Shrewsbury Electric
Light Plant, DTE 01-70

Dear Ms. Cottrell:

Pursuant to the Hearing Officer's invitation at the October 18, 2001 procedural conference, I am writing on behalf of Fiber Technologies Networks, L.L.C. to underscore the reasons that the Department should retain a hearing in its procedural schedule for this matter.

As a complaint brought by Fibertech against the Town of Shrewsbury Electric Light Plant (SELP) involving the rights of these parties, this matter involves an adjudicatory proceeding as defined in M.G.L. c. 30A § 1(1). As such, the Department is required to afford "all parties an opportunity for a full and fair hearing," including the right to compel testimony. *Id.* §§ 10, 12. The Department has already recognized as much by including hearing dates in its proposed procedural schedule.

Furthermore, SELP's purported justification for its denial of access is that, because Fibertech is a dark fiber carrier, it is not a "licensee" within the meaning of M.G.L. c. 166 § 25A and 220 C.M.R. 45.02. This broad contention calls for testimony to inform the Department's application of definitions in its governing statute and regulations. SELP's interpretation involves several steps. A licensee is defined as an entity "authorized to construct the lines or cables upon, along, under and across the public ways." An attachment in turn is defined as "any wire or cable for transmission of intelligence" 220 C.M.R. 45.02. SELP attempts to extrapolate from the references in this definition and in M.G.L. c. 159 § 12 to "transmission of intelligence" a requirement that, to be a carrier, Fibertech itself must transmit intelligence via its fiber optic network. Fibertech will introduce evidence to show that such an interpretation is inconsistent with the Department's policy practice in certifying and regulating telecommunications carriers;

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that there are numerous carriers of dark fiber (such as proposed intervenor Metromedia Fiber Networks) that provide or a vital part of competitive telecommunications networks; and how such facilities advance the Department's "policy in favor of competition and consumer choice in telecommunications" underlying its pole attachment regulations. *See* 220 C.M.R. 45.01.

In addition, subsidiary factual issues are likely to benefit from a full hearing. The precise nature of Fibertech's business plan, the nature and good faith of SELP's actions in denying pole attachments, the role of SELP and any other entrants in the telecommunications marketplace in the Town of Shrewsbury, among others, may need testimony and cross-examination as well as discovery to establish a clear record in this case.

As a start-up and new entrant, Fibertech is no less sensitive to costs than is the incumbent SELP. In this light, Fibertech expects to work cooperatively with SELP to streamline the proceeding as much as possible. Either party is free to move for summary judgment if appropriate, and the parties also may waive hearing if appropriate. But none of SELP's arguments provides a basis to sidestep the requirement of equal and fair adjudicatory hearings in setting the procedural schedule at the outset.

Respectfully submitted,

Cameron F. Kerry

CFK:jdn

cc: Robert Howley
Kenneth Barna
Alan Mandl
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